

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 12
COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

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§85-12-1. General.

1.1. Scope. -- These rules shall govern the compromise and settlement of workers' compensation issues pursuant to W. Va. Code §23-5-7.

1.2. Authority. -- W. Va. Code §§~~23-1-1; 23-1-1a(j)(3); 23-1-5; 23-1-8; 23-1-13; 23-1-14; 23-1-15~~ 23-2C-5(c)(2); 23-2C-22; 33-2-10(b); 33-2-20(a); 23-4-1 et seq.; 23-5-1; 23-5-7. Pursuant to W. Va. Code §§~~23-1-1a(j)(3)~~ §§23-2C-5(c)(2) and 33-2-10(b), rules adopted by the ~~board of managers~~ industrial council and the ~~commission~~ Insurance Commissioner are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- ~~July 20, 2005.~~

1.4. Effective Date. -- ~~September 1, 2005.~~

§85-12-2. Purpose.

The purpose of this rule is to establish a consistent process to govern the settlement of workers' compensation issues.

§85-12-3. Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. ~~"Commission" means the workers' compensation commission created pursuant to the provisions of W. Va. Code §23-1-1.~~ "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided in section one, article two, chapter thirty-three of the West Virginia Code, or any designated third-party administrator of the Insurance Commissioner.

3.2. ~~"Board" means the workers' compensation board of managers created pursuant to the provisions of W. Va. Code §23-1-1a.~~ "Industrial Council" means the industrial council created pursuant to the provisions of W. Va. Code §23-2C-5.

3.3. ~~Until the termination of the commission, "an employer that is not active in the claim" means an employer that is either defunct or has bought out its liability. For claims that~~

~~are not in litigation, an employer will be considered inactive if the employer is not represented by counsel or is not represented by an employer service company in accordance with W. Va. Code §23-1-13 and has failed to respond to the commission's notice of settlement negotiations. For claims that are in litigation, an employer will be considered inactive if the employer is not represented by counsel and has failed to respond to the commission's notice of settlement negotiations.~~

~~Upon termination of the commission, an "employer that is not active in the claim" means an employer that has, as its workers' compensation insurance carrier, the successor to the commission or other private carrier, or an employer which is in default or which has employee claims under the Old fund or other various funds regulated by the Insurance Commissioner.~~

~~"Successor to the Commission" means the Employers' Mutual Insurance Company as created by W. Va. Code §23-2C-1, et seq.~~

3.4. "Review process" refers to the period between the identification of a potential claim and the final closure of the claim pursuant to the statute.

~~3.5. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in section one, article two, chapter thirty three of the West Virginia Code, or any designated third party administrator of the insurance commissioner.~~

§85-12-4. Parties.

~~The claimant, the employer and the Insurance Commissioner, commission, the successor to the commission or other private insurance carriers, or self-insured employer, whichever is applicable, may negotiate a settlement of any and all issues in a claim or claims, except for medical benefits for nonorthopedic occupational disease claims, pursuant to the requirements of W. Va. Code §23-5-7 and the regulations herein set forth. The Insurance Commissioner, commission, the successor to the commission or other private insurance carriers, whichever is applicable, and the claimant may negotiate a settlement of a claim when the employer is not active in the claim. In multiple employer claims, all employers active in the claim must be parties to the settlement agreement. All corporate employers must be represented by an attorney licensed to practice law in the State of West Virginia.~~

§85-12-5. Notice.

~~If the employer has not been notified of pending settlement negotiations, the Insurance Commissioner, the commission, the successor to the commission or other private insurance carrier, whichever is applicable, will notify the employer by certified mail, giving the employer thirty (30) days to respond to the Insurance Commissioner, commission, the successor to the commission or other private insurance carrier, whichever is applicable. If the employer fails to respond to the notice or chooses not to participate, the Insurance Commissioner, commission, the successor to the commission or other private insurance carrier, whichever is applicable, may negotiate a settlement on behalf of the employer in accordance with W. Va. Code §23-5-7.~~

§85-12-~~65~~. Issues Subject to Settlement.

If the claim is in the review or appellate process, all claim issues, except for medical benefits for non-orthopedic occupational disease claims, may be settled, even though the issues may not be currently contested. These issues include, but are not limited to, temporary total disability, temporary partial disability, permanent partial disability, permanent total disability, vocational rehabilitation and any other issues within the settlement provisions of W. Va. Code §23-5-7.

§85-12-~~76~~. Manner of Payment.

The parties to any settlement may arrange for any amount paid to be paid to the claimant or for the benefit of the claimant in a lump sum or in incremental payments or in any manner as agreed upon by the parties. If no mention is made in the settlement agreement regarding a permanent disability percentage, the claim record will not reflect a percentage for the settlement award.

§85-12-~~87~~. Dependent's Benefits.

Except in cases where the claimant has previously been granted a permanent total disability award, dependents are not entitled to one hundred four (104) weeks of benefits as set forth in W. Va. Code §23-4-10 if the agreement is silent as to the claimant's entitlement to a permanent total disability award.

§85-12-~~98~~. Settlement Not to be Considered an Admission Against Interest.

The terms of a settlement agreement shall not constitute an admission against interest by any party. All communications and correspondence between the parties during settlement negotiations are confidential and may not be used against a party if a settlement is not reached.

§85-12-~~109~~. Effective Date of Settlement.

Unless otherwise agreed upon by the parties, the effective date of a settlement shall be the date the agreement is executed by the claimant and ~~by the employer and~~ Insurance Commissioner, ~~commission~~, the successor to the commission or other private insurance carrier, or self-insured employer, whichever is applicable.

§85-12-~~1110~~. Minor Dependents and Claimants.

In any case in which a surviving dependent infant may be entitled to receive the balance of a permanent partial disability award due to the death of a claimant before such award was paid in full or in any case in which the claimant is an infant, the legal guardian of such infant may negotiate a settlement of such claim with the ~~employer or employers involved and the~~ Insurance Commissioner, ~~commission~~, the successor to the commission or other private insurance carriers,

and self-insured employers, whichever is applicable. The legal guardian shall proceed as set forth in W. Va. Code §44-10-14. The appointment of said guardian shall be done as set forth in W. Va. Code §44-10-1 et seq. No bond shall be required of said guardian by the Insurance Commissioner ~~or commission, whichever is applicable~~, in addition to that required by the appointment of said guardian or approval by the circuit court of any settlement pursuant to the provisions of W. Va. Code §44-10-1 et seq.

§85-12-~~12~~11. Death of Claimant.

Unless otherwise agreed upon by the parties, should a claimant to whom an award has been made pursuant to a settlement die, the unpaid balance of the award shall be paid to the claimant's dependents as defined in W. Va. Code §23-4-10, if any. The payment shall be made in the same installments which would have been made to the claimant if living, but, unless otherwise specified in the settlement agreement, no payment shall be made to a surviving spouse of the claimant after his or her remarriage and such liability shall not accrue to the estate of such claimant and shall not be subject to any debts or charges against the estate.

If the claimant dies while the settlement is pending and the claimant is survived by dependents, the settlement may continue as if the death had not occurred. The payment shall be made to the dependents.

§85-12-~~13~~12. Deductions From Settlement Awards.

~~13.1.~~ 12.1. Pursuant to W. Va. Code §23-4-18, any amounts owed for child or spousal support will be withheld from settlement payments.

~~13.2.~~ 12.2. Overpayments will be deducted pursuant to W. Va. Code §§~~23-4-1c~~ and 23-4-1d, unless otherwise agreed upon by the parties in the agreement.

~~13.3.~~ 12.3. Any award of monetary benefits entered in the claim being settled by the ~~workers' compensation~~ Insurance Commissioner, ~~commission~~, successor to the commission or other private carrier, or self-insured employer, the office of judges, the Appeal Board or the Supreme Court of Appeals of West Virginia after the date the settlement agreement was signed by the necessary parties shall be deducted from the agreed upon settlement amount. If the amount of any such award is greater than the agreed upon settlement amount, the claimant's recovery shall be limited to the amount specified in the settlement agreement.

§85-12-~~14~~13. Settlement Terms.

Under the terms of the agreement, the claimant shall be provided five (5) business days to revoke the executed settlement agreement. In addition and in accordance with the provisions of W. Va. Code §23-5-7, each settlement agreement shall provide the toll free number of the West Virginia State Bar. ~~Also, in accordance with the provisions of W. Va. Code §23-5-7, upon termination of the commission and upon promulgation of the rule required by statute, the Insurance Commissioner may void settlement agreements entered into by an unrepresented~~

~~injured worker which are determined to be unconscionable pursuant to criteria established by rule of the Insurance Commissioner.~~

§85-12-14. Insurance Commissioner Review.

14.1. In accordance with the provisions of W. Va. Code §23-5-7, the Insurance Commissioner may review any workers' compensation settlement entered into between an unrepresented claimant and the Insurance Commissioner, the successor to the commission or other private insurance carriers, or self-insured employer, and may declare any such settlement void if the Insurance Commissioner determines the terms of the settlement to be unconscionable pursuant to the criterion set forth in subsection 14.2 of this section. The authority of the Insurance Commissioner to review and void settlements also includes all settlements entered into between unrepresented claimants and the former Workers' Compensation Commission between January 29, 2005 and December 31, 2005.

14.2. A workers' compensation settlement shall be considered unconscionable, and therefore be declared void as against public policy, if it is found to constitute a gross miscarriage of justice or is otherwise found to be clearly unfair.

Criteria to be considered by the Insurance Commissioner in determining whether a settlement is unconscionable include, but are not limited to:

a. The relative position of the parties involved in the settlement at the time the settlement was entered into;

b. The adequacy of the bargaining position of the parties at the time the settlement was entered into;

c. The meaningful alternatives available to the claimant at the time the settlement was entered into;

d. The existence of specific unfair terms in the settlement agreement;

e. The nature of the entire agreement;

f. The percentage of total benefits provided for under the settlement terms which have actually been received by the claimant when the claimant requested the settlement be reviewed; and

g. The time that has elapsed from the time the settlement was entered into to the time the claimant requested the settlement be reviewed.

14.3. The claimant shall at all times have the burden of proving that a settlement agreement is unconscionable. The mere fact that the terms of a workers' compensation settlement are such that the claimant may not have received the same amount of benefits which

he would have received under chapter twenty-three of the West Virginia Code, or that the claimant may have been able to obtain more benefits had the claimant chose to not enter into the settlement, is not sufficient to render a settlement unconscionable. Rather, the claimant must prove the settlement was unconscionable based on the criterion and standards set forth in subsection 14.2 of this section.

14.4. The fact that a claimant's injury or occupational disease has unexpectedly progressed or become worse since the time the settlement was entered into cannot be a justification for a settlement to be deemed unconscionable.

14.5. Procedure for review.

a. Any claimant who believes that a settlement previously entered into is unconscionable may file with the Insurance Commissioner, on a form prescribed by the Insurance Commissioner, a request for review of settlement. The Insurance Commissioner will then forward the request to a hearing examiner. The hearing examiner shall permit all parties involved in the disputed settlement to present, as part of the record, written argument and evidence as to each party's position regarding the settlement. Additionally, each party shall be permitted to request a hearing before the hearing examiner in regard to the settlement review, with the opportunity to present at the hearing argument and evidence regarding the settlement. The hearing examiner shall have broad discretion in regard to the scope of evidence and discovery, if any, permitted in conjunction with such hearings and the settlement review process in general. Hearings shall otherwise be in accordance with the provisions of Sections 4 through 10 of 85CSR7.

b. Within forty-five (45) days after the request for review is submitted, the hearing examiner shall submit to the Insurance Commissioner factual findings, legal conclusions and a proposed decision either affirming the settlement or declaring the settlement void due to it being unconscionable: *Provided*, That upon request of one of the involved parties, the hearing examiner may, for good cause, extend the settlement review period for a period of an additional forty-five (45) days.

c. Upon receipt of the hearing examiner's recommended decision, the Insurance Commissioner shall then either enter an order consistent with the hearing examiner's recommended decision or an order based on a rejection or modification of the hearing examiner's decision. To the extent that the Insurance Commissioner rejects or modifies the recommended decision of the hearing examiner, the Commissioner shall furnish his or her own findings of fact and conclusions of law.

d. A copy of the final order or decision of the Insurance Commissioner shall be served upon each involved party, or if a party is represented by counsel, its attorney of record. Service shall occur in person or by certified mail.

14.6. Any aggrieved party shall have the right to appeal the order of the Insurance Commissioner to Circuit Court under the provisions of W. Va. Code §29A-5-4.

§85-12-15. Severability.

If any provision of these rules or the application thereof to any person, party, or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.